PRIVY COUNCIL REPORT

R. SAMBASIVAM v. PUBLIC SERVICES COMMISSION & ANOR.

[P.C. (Lord Diplock, Lord Hodson & Lord Cross of Chelsea) June 28, 1971]

[Privy Council Appeal No. 33 of 1970]

Administrative Law — Public Officer — Disciplinary proceedings against — Conduct appearing to head of department to merit dismissal — Proceedings need not be initiated by head of department — Non-disclosure of letter of complaint — Letter not shown to committee of inquiry — No failure of natural justice — General Orders Cap. "D" reg. 38.

In this case disciplinary proceedings had been taken against the appellant under regulation 38 of General Orders Cap. "D". After reading the report of the committee of inquiry, the Public Services Commission directed that the appellant be dismissed. The proceedings against the appellant were instituted by the secretary to the Ministry of Labour, who sent a letter of complaint to the Public Services Commission. At the hearing before the committee of inquiry, the case against the appellant was presented by the Commissioner of Labour, who was the Head of Department of Labour in which the appellant was employed. The appellant applied for an order of *certiorari* to quash the decision of the Public Services Commission and this application was dismissed in the High Court ([1969] 1 M.L.J. 219) and on appeal in the Federal Court ([1970] 1 M.L.J. 61). On further appeal to the Privy Council it was argued: (a) the committee of inquiry had no jurisdiction to hear the charges against the appellant because the condition precedent to the initiation of proceedings namely "that the appellant's conduct should appear to the head of department to merit dismissal" was not complied with; (b) the failure to provide the appellant with a copy of the letter of the secretary to the Ministry of Labour constituted a breach of the rules of natural justice.

Held, dismissing the appeal: (1) regulation 38 of General Orders Cap. "D" does not require that the decision to invite the Public Services Commission to intitiate proceedings with the view to an officer's dismissal should be taken by the head of department. All that is required is that at the appropriate time the head of department should in fact be of the opinion that the conduct of the officer merits dismissal. In this case having regard to the fact that the head of department himself conducted the case against the appellant before the committee of inquiry, the inference is irresistible that by the date when the charges were formulated, the head of department considered that the appellant's conduct, taken as a whole, as set out in the charges, merited dismissal;

(2) the policy disclosed by the regulation 38 of General Orders Cap. "D" and the immediately preceding orders dealing with officers of lesser rank is that, except in the case of conviction for a criminal offence, an officer should not be dismissed unless both the head of his department and the disciplinary authority consider that his conduct merits dismissal;

(3) there was no breach of the rules of natural justice in this case as there was no evidence that the letter of the secretary to the Ministry of Labour was ever shown to any member of the committee of inquiry. The fact that the appellant was not given an opportunity of dealing with the other complaints in the letter of which the Public Services Commission were cognisant but did not regard as sufficiently serious to justify investigation by the committee of inquiry did not amount to any breach of the rules of natural justice.

Case referred to:-

(1) *Kanda* v. *Government of Malaya* [1962] M.L.J. 169, P.C.

PRIVY COUNCIL.

C. Fletcher-Cooke Q.C. and *Eugene Cotran* for the appellant.

Robert Gatehouse Q.C. and *R. Alexander* for the respondents.

Lord Diplock (delivering the judgment of the Board): This appeal arises out of disciplinary proceedings taken against the appellant under General Order D. 38 made by the Yang di-Pertuan Agong under article 132(2) of the Constitution of Malaysia.

At the relevant time the appellant was an officer on the pensionable establishment in Division II of the public service. The post which he held was that of Junior Assistant Commissioner of Labour in the Department of Labour, which is one of several departments within the Ministry of Labour. The Head of the Department of Labour was Inche Kumar. As such he was subordinate to the Secretary of the Ministry of Labour, Dato Yeap.

The disciplinary proceedings were started by a statement in writing prepared by the appropriate disciplinary authority, the Public Services Commission. This was sent to the appellant under cover of a letter of 8th December 1966. It contained six charges. The first three were of failing to disclose to his head of department a serious pecuniary embarrassment. The last three were more serious and related to issuing cheques which were later dishonoured.

On 17th January 1967 the appellant sent an exculpatory letter to the disciplinary authority containing his answers to the charges. In March 1967 he was sent a written statement of two additional charges. To these he also sent a written reply.

His explanations failed to satisfy the disciplinary authority and some time in May it appointed a committee to enquire into the matter, under paragraph (c) of General Order D. 38. This is an independent committee which does not include any member of the disciplinary authority. It is composed of a legal chairman and two other senior government officials.

The committee of inquiry held oral hearings on 28th to 29th November 1967, and again, after an adjournment, on 5th/6th and 7th March 1968. At these hearings the appellant was represented by counsel and the case against him was presented by Inche Kumar who also gave evidence.

In the course of his cross-examination, Inche Kumar was asked six questions. Upon his answers to these the whole superstructure of this appeal is based. They were as follows:

"(Q) The letter dated the 8th December 1966 to Sivam that his conduct appeared to the head of department to merit dismissal was sent through the Setia Usaha Kementerian Buroh?

(A) Yes.

(Q) Dato Yeap Kee Aik was then the secretary of the Minister for Labour?

(A) Yes.

(Q) The letter was sent through him because it was he who reported to the Public Services Commission that it appeared to him that Sivam's conduct merited dismissal?

(A) Yes.

(Q) Did he make this report verbally or in writing?

(A) He did it in writing by a letter dated the 26th October 1966.

(Q) So the decision to initiate proceedings against Sivam was his and his alone?

(A) Yes.

(Q) But it is you who is the head of department and not Dato Yeap Kee Aik?

(A) Yes, I am the head of department and not Dato Yeap."

After the last answer, the appellant's counsel submitted that the proceedings were *ultra vires* on the ground that the disciplinary proceedings were initiated by Dato Yeap, who was not the head of the appellant's department, and not by Inche Kumar who was. He further submitted that the evidence showed that at the time when the proceedings were initiated Inche Kumar did not consider that the conduct of the appellant merited dismissal.

Apparently Inche Kumar showed to the appellant's counsel either at or immediately after the hearing in November 1967 a copy of Dato Yeap's letter of 26th October 1966, and allowed him to read it, but did not give him a copy. On 30th November 1967 the appellant's counsel wrote to Inche Kumar asking for a copy. This request was refused.

After an adjournment to consider the appellant's submission the committee of inquiry completed the hearings in March 1968 and made its report to the disciplinary authority pursuant to paragraph (j) of General Order D. 38. Upon considering this report, the disciplinary authority on 30th April directed that the appellant should be dismissed.

On 22nd June 1968 the appellant applied for leave to apply for an order of *certiorari* to quash the decision of the disciplinary authority. Leave was granted and the application heard by Raja Azlan Shah J. in the High Court. He gave judgment on 7th February 1969, dismissing the application. On appeal to the Federal Court of Malaysia (H. T. Ong C.J., Gill and Ali F.JJ.) the appeal was dismissed.

In the High Court and the Federal Court the appellant relied upon a number of points additional to those which have been relied upon in his further appeal to their Lordships' Board. The two surviving points upon which he still relies are:

1. that the court of inquiry had no jurisdiction to hear the charges against the appellant because the condition precedent to the initiation of the proceedings, namely, that "the appellant's conduct should appear to the head of the department to merit dismissal" was not complied with: and
2. that the failure to provide the appellant with a copy of Dato Yeap's letter of 26th October 1966 constituted a breach of the rules of natural justice.

To deal first with the point about the condition precedent.

In their Lordships' view, the appellant's submission has throughout involved a confusion between the means by which the disciplinary authority is informed of the opinion of the head of department that an officer's conduct merits dismissal and the fact that the head of department does indeed hold that opinion. In contrast to disciplinary proceedings against officers of lower rank than those on the pensionable establishment in Division I or II of the Public Service, General Order D. 38 contains no specific requirement for any report to be made by the head of department himself.

The relevant introductory words in General Order D. 38 are: "If the conduct of an officer on the pensionable establishment in Division I or II of the public service appears to the head of department to merit dismissal, the following procedure will be adopted."

The subsequent paragraphs deal with the procedure to be adopted by the disciplinary authority and by any committee of inquiry which it appoints. That procedure comprises three stages. The preliminary stage is initiated by the disciplinary committee itself formulating the charges which it considers the officer should be called upon to answer in writing. That stage ends with the consideration by the disciplinary authority of the officer's exculpatory statement and its decision either to proceed no further on the charges or to appoint an independent committee to inquire into them and to report. The second stage consists of the hearing by the committee of the charges and its making a report to the disciplinary authority. The final stage is the consideration by the disciplinary authority of the committee's report and the decision of the disciplinary authority either to dismiss or not to dismiss the officer.

Under this procedure once an officer's conduct has been brought to the attention of the disciplinary authority as meriting dismissal, the initiative and the power of decision lies with the disciplinary authority alone. It decides what charges should be the subject of proceedings. It decides whether or not the officer's written statement is sufficient to exculpate himself entirely or to make it appropriate to take proceedings for a lesser punishment than dismissal. It appoints the committee of inquiry if it considers that proceedings for the officer's dismissal should continue. It has power to add additional charges after the inquiry has commenced. When the committee has reported, the decision whether or not the officer shall be dismissed is that of the disciplinary authority alone.

In their Lordships' view the channel by which the disciplinary authority is informed of the officer's conduct and of the opinion of the head of his department that it merits dismissal does not matter. All that is required by the introductory words of General Order D. 38 is that at the appropriate time the head of department should in fact be of that opinion. If he is of that opinion, it matters not that the decision to invite the disciplinary authority to initiate proceedings with a view to the officer's dismissal is taken by a member of the public service of higher rank than the head of department of the officer whose conduct is in question — in the instant case Dato Yeap, who was superior in authority in the same Ministry to the appellant's head of department, Inche Kumar.

In their Lordships' opinion the appropriate time by which the head of department must have formed the opinion that the officer's conduct merits dismissal is, at the earliest, the date at which the charges against him are formulated by the disciplinary authority — in the instant case 8th December 1966.

In saying this, their Lordships must not however be taken as expressing the view that this is necessarily

the latest date. Under the procedure laid down in the General Order the officer is not in real jeopardy of dismissal by the disciplinary authority until after it has received his exculpatory letter and being dissatisfied by it has decided to appoint a committee to enquire into the matter. Their Lordships would observe that in the instant case two additional charges, the particulars of which did not appear in the record, were added to the original six charges before the disciplinary authority decided to appoint the committee of inquiry and it may well be that it is sufficient compliance with the requirements of the introductory words of the General Order D. 38 that the head of department should have formed the necessary opinion by this later date — in the instant case some time in May 1967.

It has been submitted to their Lordship's Board that Inche Kumar did not in fact think that the appellant's conduct did merit dismissal. Their Lordships would observe that the appellant's counsel refrained from putting this question to Inche Kumar in cross-examination — no doubt for the very good reason that Inche Kumar was in person presenting the case for the appellant's dismissal at the committee of inquiry. The appellant, however, relies upon an inference sought to be drawn from an allegation made by his counsel in his written submission to the committee of inquiry: that in August 1966 Inche Kumar had made an observation "that the officer may be considered disqualified for promotion". But that written submission was based upon the assumption, which their Lordships have held to be erroneous, that the crucial date by which Inche Kumar must have formed the opinion that the appellant's conduct merited dismissal was that of Dato Yeap's letter to the disciplinary authority of 26th October 1966. The submission asserts that at the date of Inche Kumar's alleged observation in August 1966 he knew of the facts relating to the first three charges only, and that the facts relating to the second three charges "came to light only towards the end of November". The end of November was after the date of Dato Yeap's letter of 26th October 1966, but before the date when disciplinary proceedings were initiated by the disciplinary authority on 8th December 1966; and these allegations, which their Lordships are prepared to accept as accurate, appear to be directed to establishing that Inche Kumar changed his opinion as to the gravity of the appellant's misconduct between the date of Dato Yeap's letter and the initiation of proceedings by the disciplinary authority.

Their Lordships have already pointed out that the last three charges set out in the disciplinary committee's statement of 8th December 1966 are more serious than the first three. Having regard to the fact that Inche Kumar himself conducted the case against the appellant before the committee of inquiry, the inference is irresistible that by the date when the charges were formulated Inche Kumar, as well as Dato Yeap, considered that the appellant's conduct, taken as a whole as set out in the six charges, merited dismissal. The appeal, in so far as it is based upon the first point relied upon by the appellant, must fail.

Although the point that Inche Kumar, as well as Dato Yeap, were of opinion that the appellant's conduct merited dismissal was taken in the High Court and the Federal Court, it was not dealt with in their judgments. The High Court took the view, based on a definition of head of department in General Order A. 3, that both Dato Yeap and Inche Kumar were the appellant's "Head of Department".

The definition in General Order A. 3 is expressed to apply to Chapter A only. In their Lordships' view it cannot be read into Chapter D which contains a number of provisions which would be unworkable if there were more than one "Head of Department" for the purposes of that chapter.

The High Court also relied upon the additional ground that the introductory words of General Order D. 38 were directory only and that it was sufficient compliance with them if any officer of the rank of head of department or higher formed the necessary adverse view as to the appellant's conduct.

The Federal Court did not base its decision on the view that Dato Yeap was the appellant's "Head of Department" and this argument has not been advanced by the respondents before their Lordships' Board. The Federal Court, however, adopted the second ground on which the judgment of the High Court was based.

Their Lordships, however, do not find themselves able to accept this construction of the Order. In their view, the policy disclosed by the General Order D. 38 and the immediately preceding orders dealing with officers of lesser rank is that, except in the case of conviction for a criminal offence, an officer should not be dismissed unless both the head of his department and the disciplinary authority consider that his conduct merits dismissal.

Their Lordships accordingly would dismiss the appeal on this point on the ground previously stated, namely, that the irresistible inference on the evidence is that at the time of the initiation of the proceedings on the 8th December 1966 the appropriate head of department, who was Inche Kumar, was of the opinion that the appellant's conduct merited dismissal.

To deal now with the point about the failure to observe the rules of natural justice. Dato Yeap's letter of complaint of 26th October 1966 was addressed to the disciplinary authority. It contained the material upon which the statement of the first three charges was prepared by the disciplinary authority. There is some evidence that it contained a reference to other conduct of the appellant which did not form the subject matter of any charges prepared by the disciplinary authority. The inference from this is that the disciplinary authority did not consider that conduct sufficiently serious to form the subject matter of any charge. There is no evidence that Dato Yeap's letter was ever shown to any member of the committee of inquiry. Indeed, all the evidence is to the contrary. It cannot therefore have influenced them in their report on the charges which they were investigating and it is their report upon which the disciplinary authority is required to base its decision whether or not to dismiss the appellant. In their Lordships' view the fact that the appellant was given no opportunity of dealing with com-

plaints of which the disciplinary authority was cognisant but did not regard as sufficiently serious to justify investigation by the committee of inquiry does not amount to any breach of the rules of natural justice.

Before their Lordships' Board the appellant relied upon *Kanda* v. *Government of Malaya.*[1] In their Lordships' view it does not support the appellant's contention. In that case the Commissioner of Police had received a report of a board of inquiry into the conduct of other police officers. This contained grave allegations against Mr. Kanda. It was this report that caused the commissioner to institute disciplinary proceedings against Mr. Kanda and to appoint a person to enquire into Mr. Kanda's conduct and to report to him. The report of this board of inquiry was supplied by the Commissioner of Police to the person conducting the inquiry into Mr. Kanda's own conduct. But it was never disclosed to Mr. Kanda. He had no opportunity, at the hearing of the inquiry into his own conduct, of dealing with the allegations against him which it contained. It is plain from the judgment that the breach of the rules of natural justice in that case consisted in making available to the person who conducted the inquiry these gravely damaging allegations. There would have been no breach if the Commissioner of Police had not done this, but had kept them to himself.

Their Lordships accordingly would also dismiss this appeal on the second ground relied upon by the appellant.

Their Lordships will report to the Head of Malaysia their opinion that this appeal should be dismissed and that the appellant should pay the respondents' costs.

Appeal dismissed.

Solicitors: *T. L. Wilson & Co.; Stephenson, Harwood & Tatham.*

SINGAPORE REPORT

TAN HIN CHOON & ORS. v. BAN HIN LEE BANK LTD.

[O.C.J. (Choor Singh J.) August 6, 1971]
[Singapore — Suit No. 2178 of 1965]

Land Laws — Conveyancing — Transfer of property — Intention of the parties to the conveyance — Absence of valuable consideration — Property conveyed as security — Overdraft facilities by bank — Legal mortgage — Mortgagor's right to redeem property.

Limitation — Redemption action — Conveyance — Mortgage — Limitation Ordinance, 1959, ss. 16, 18 and 27 — Extinguishment of mortgagor's right and title to the property.

The plaintiffs claimed a declaration that the property known as 801 Pasir Panjang Road, Singapore, which was registered in the name of the defendants, was held by them on trust for the plaintiffs absolutely. In the alternative, the plaintiffs claimed a declaration that notwithstanding the conveyance of the December 24, 1953, under which the said property was transferred to the defendants, the plaintiffs were entitled to redeem the said property upon payment to the defendants of the amount found due to them for principal and interest. The defendants maintained that the said conveyance was for valuable consideration and that the intent of the parties to the conveyance and the legal effect of it was to vest the property in the defendants free from any right or interest of the transferors. The defendants claimed that by virtue of the said conveyance. they became the absolute and sole beneficial owners of the said property.

Held, dismissing the claim: (1) the plaintiffs' claim to a declaration that the said property registered in the name of the defendants was held by them on trust for the plaintiffs absolutely was not supported by the evidence and they were not entitled to such a declaration;

(2) the conveyance of the December 24, 1953 under which the said property was transferred to the defendants was in fact a legal mortgage and the defendants were mortgagees in possession;

(3) the plaintiffs having failed to bring their claim to redeem the said property within 12 years of the execution of the conveyance of the December 24, 1953, were now precluded by virtue of the provisions of section 16 of the Limitation Ordinance, 1959 from bringing any such action:

(4) the expression "action to recover land" in section 18 of the Limitation Ordinance includes a redemption action. The plaintiffs having failed to bring their claim to redeem the property within 12 years as provided by section 16, their right and title to the property was extinguished by virtue of the provisions of section 18 of the Limitation Ordinance, 1959. Consequently their claim failed and must be dismissed with costs.

Case referred to:-

(1) *Cockburn* v. *Edwards* (1881) 18 Ch. D. 449.

CIVIL SUIT.

K. S. Chung for the plaintiffs.

C. H. Smith (*Y. R. Jumabhoy* and *R. Ramason* with him) for the defendant bank.

Cur. Adv. Vult.

Choor Singh J.: In this suit the plaintiffs claim a declaration that the property known as 801 Pasir Panjang Road, Singapore, which is now registered in the name of the defendants is held by them on trust for the plaintiffs absolutely. In the alternative, the plaintiffs claim a declaration that notwithstanding the conveyance of the 24th December, 1963 under which the property was transferred to the defendants, the plain-